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No. 239

In the

Supreme Court of the United States

OCTOBER TERM, 1965

On Petition for Writ of Certiorari to the Texas Court of Civil Appeals at El Paso

UNITED SPECIALTY ADVERTISING COMPANY AND UNITED SPECIALTY PRODUCTION COMPANY,

Petitioners,

v.

FURR'S, INC., REX WEBSTER, LEON E. HARRIS AND HOWARD WELBORN, individually and dba WEBSTER, HARRIS & WELBORN ADVERTISING AGENCY,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

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Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

To The Honorable Supreme Court of the United States:

Furr's, Inc., et al, Respondents, submit this Reply to Petitioners' Writ of Certiorari to the Texas Court of Civil Appeals at El Paso, and would respectfully show the following:

OPINIONS BELOW

The opinion of the Texas Court of Civil Appeals at El Paso that is here attached is reported in 385 S.W. 2d, commencing at page 456 (November 25, 1964, error ref. n.r.e.).

A previous decision of the Texas Court of Civil Appeals at El Paso on an appeal from a temporary injunction is reported in 338 S.W. 2d, commencing at page 762 (Tex. Civ. App. 1960, error ref. n.r.e.).

JURISDICTION

Petitioners seek to invoke jurisdiction under *Title 28, U.S.C.*, Section 1257(3), under the theory that Petitioners were denied a jury trial and thereby denied equal protection of the laws under *Section 1* of the *Fourteenth Amendment* to the *United States Constitution.*

We respectfully submit that there is no basis for jurisdiction or review of the decision of the Texas Court of Civil Appeals and that Petitioners were, in no matter, denied a jury trial nor denied equal protection of the laws. This will hereafter be fully discussed in detail.

QUESTION PRESENTED FOR REVIEW

Petitioners state that the question is whether the denial of a jury trial because of an unsuccessful attempt to secure a temporary injunction at an earlier stage in the proceedings deprives a litigant of equal protection of the laws.

We would merely point out here (as will be fully discussed below) that the factual basis upon which Petitioners' "question" and brief is predicated is incorrect. Petitioners were not denied a jury trial at all and were not denied a jury trial because of an unsuccessful attempt to secure a temporary injunction previously. The Texas Court of Civil Appeals merely reversed and rendered judgment for Respond-

ents in this case because, inter alia, there was no evidence to support a verdict or judgment for plaintiffs and defendants were entitled to judgment as a matter of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional and statutory provisions involved or material to this appeal are copied verbatim in the Appendix and are as follows:

(1) Appendix A — 14th Amendment to United States Constitution, Section 1;

(2) Appendix B — Article 1, Section 15, Texas Constitution (relating to right to trial by jury);

(3) Appendix C — Article 2123, Vernon's Texas Civil Statutes (relating to trial by jury);

(4) Appendix D — Rule 166-A, Texas Rules of Civil Procedure, Subdivisions (a) and (c) (summary judgment);

(5) Appendix E — Rule 301, Texas Rules of Civil Procedure (rule relating to judgment non obstante veredicto);

(6) Appendix F — Rule 56(a) and (c), Federal Rules of Civil Procedure (summary judgment);

(7) Appendix G — Rule 50, Federal Rules of Civil Procedure (relating to directed verdict and judgment n.o.v.);

(8) Appendix H — Rule 8(a), Federal Rules of Civil Procedure (general rules of pleading);

(9) Appendix I — Rule 45, Texas Rules of Civil Procedure (rule relating to pleading);

(10) Appendix J — Rule 47, Texas Rules of Civil Procedure (rule relating to pleading).

STATEMENT OF THE CASE

In February, 1960, United Specialty Advertising Company, et al, filed suit against Furr's, Inc., alleging that it was engaged in the sale of an advertising specialty known as "bonus cards," which it had developed; that in September, 1959, the defendant entered into a contract to purchase certain quantities of these cards from plaintiffs and in connection with the sale plaintiffs also furnished bag stuffers, etc. Plaintiffs alleged that in January, 1960, defendant distributed its own cash circle bonus cards; that defendant's cards were an unlawful imitation of the cards of plaintiffs, which involved piracy, breach of confidential relationship, appropriation, conversion, breach of fiduciary relationship, utilizing plaintiffs' trade secrets, infringing plaintiffs' rights, etc. Plaintiffs sought a temporary writ of injunction restraining and enjoining defendant and its agents, servants, representatives from using or in any manner infringing upon plaintiffs' advertising scheme, and prayed that such injunction be made permanent and that plaintiffs have judgment for damages in the amount of $750,000 and for such other relief as they may be entitled. After a lengthy hearing and presentation of evidence, the trial court granted plaintiffs a temporary injunction, from which defendants appealed. In 388 S.W. 2d 762, the Texas Court of Civil Appeals dissolved and dismissed the temporary injunction. Plaintiffs' application for writ of error was refused by the Texas Supreme Court, "no reversible error." The Court of Civil Appeals held in 338 S.W. 2d 762 that as a matter of law

plaintiffs had no legally protectable right. The Court of Civil Appeals held that the bonus cards did not constitute a trade secret and that, furthermore, any information obtained by defendants in connection therewith was not obtained through breach of confidence or confidential relationship and that no unfair trade or competition was involved.

Before the jury trial on the merits, plaintiffs amended their petition and included as defendants the members of the advertising agency which prepared the card for Furr's, Inc. Just as in the original petition, plaintiff's entire cause of action was based upon an alleged wrongful appropriation or copying by defendants of plaintiffs' "bonus card" advertising device, and plaintiffs again sought a permanent injunction restraining defendants from utilizing in any way plaintiffs' advertising scheme and for monetary damages (Tr. 3). The trial court awarded plaintiffs judgment for $60,000 and a permanent injunction based upon a jury verdict.

Defendants appealed, inter alia, on the ground that the trial court erred in refusing to grant defendants' motion for instructed verdict, and motion for judgment n.o.v., defendants being entitled to judgment as a matter of law, and there being no evidence to support the jury's answers to certain issues.

The Texas Court of Civil Appeals, in 385 S.W. 2d 456, reversed the judgment of the trial court, dissolving the

injunction and rendered judgment that plaintiffs take nothing. In essence, the Court of Civil Appeals held:

(1) The "law of the case" precluded recovery on the theory of trade secret or confidential relationship, since there was no material difference in the evidence material to these theories presented in the injunction hearing and in the trial on the merits.

(2) That under the evidence presented in this case plaintiff was precluded from recovery as a matter of law in that:

(a) There was no evidence to establish a confidential relationship between the parties and thus no basis for judgment on confidential relation or appropriation of trade secret;

(b) No evidence of unfair competition because no confidence was violated and there was no "palming off" of one goods for those of another;

(c) No proof of elements of civil conspiracy.

ARGUMENT AND AUTHORITIES

Petitioners' Contention that Petitioners Were Denied a Trial by Jury

Petitioners quote the following sentence from the Court of Civil Appeals: "The evidence is more voluminous, but its quality is unchanged." This sentence was contained in the discussion by the Court on the question of the "law of the case" as it related to Petitioners' theories of trade secret and confidential relationship. Petitioners conclude from this sentence and attempts to persuade this Court that the Texas Court of Civil Appeals substituted its own find-

ing of fact for that of the jury and that even though the Court of Civil Appeals discussed in detail and specifically held that there is no evidence to support judgment for plaintiffs on any theory, that the subsequent discussion by the Court is merely "obiter dictum" and "purported grounds" of the Court's decision (Petition for Certiorari, pages 6, 7, 12).

Petitioners also contend that the case in the trial on the merits was entirely different than that on the hearing for temporary injunction.

Under the Texas Rules, as under the Federal Rules, relating to pleadings, the purpose and requirement of the petition is to give the defendants notice of the claim asserted by plaintiffs and the relief sought (Appendixes H, I, J). The theories of recovery are immaterial. An examination of the pleadings clearly reveals that the case was the same. Plaintiffs originally sought damages and an injunction against defendant from the use of its cash circle card because plaintiffs claimed such use to be an infringement upon their exclusive right. The transactions and facts upon which plaintiffs based their claim and the relief sought were the same in the trial on the merits.

In the appeal on the temporary injunction the Court of Civil Appeals held as a matter of law that no trade secret or confidential relationship existed. In this appeal, the Court of Civil Appeals held that the granting or refusal of a temporary injunction is not res judicata, but may become the "law of the case" as to the legal principles declared

and held that the application of the "law of the case" depends in each case on what was done. The facts reflected by the jury findings in the trial on the merits and the evidence in the temporary injunction hearing were identical (338 S.W. 2d 762, at page 765; Tr. 73, 74). In effect, the Court of Civil Appeals held that the trial court erred in refusing to grant Defendants' Motion for Instructed Verdict or Motion for Judgment N.O.V., since the controlling evidence presented in the trial on the merits was the same as that presented in the hearing for temporary injunction. Since the controlling facts were unchanged, the law applied to such facts would not be subject to change. In fact, to sustain a temporary injunction, plaintiffs had a lesser burden than in a trial on the merits. To sustain temporary injunction, plaintiffs need only show a "probable right." If the evidence did not sustain a temporary injunction on the theory of trade secret or confidential relationship as a matter of law, certainly the same evidence could not sustain a judgment for plaintiffs on such theories on the merits. A holding contrary to that of the Court of Civil Appeals would not only be contrary to the law but would defy logic.

Decision and Holding of the Court of Civil Appeals That There Was No Evidence to Support Recovery for Plaintiffs on Any Theory

The right to trial by jury refers to the right as it existed at common law. *Welch v. Welch*, 369 S.W. 2d 434, 436 (1) (Tex. Civ. App. 1963, no writ history to date); *Swinford v. Logue*, 313 S.W. 2d 547, 549 (1) (Tex. Civ. App. 1958,

mandamus overruled). It is, of course, fundamental that the jury may only pass upon questions of fact and it is for the trial judge and appellate courts to determine questions of law: e.g., *In Re: Higginbotham's Estate*, 192 S.W. 2d 285 (7) (Tex. Civ. App. 1946, no writ hist.).

The Texas Rules of Civil Procedure, as well as the Federal Rules, provide for the granting of summary judgment, directed verdict or judgment n.o.v. when no material fact issue exists, and one party is entitled to judgment as a matter of law (Appendixes D, E, F, G). It is well settled that such rules are constitutional and in no manner deprive plaintiff of a right to jury trial or any other constitutional right. *Galloway v. United States*, 319 U.S. 372, 87 L. Ed. 1458 (1942); *Cox v. City of Freeman*, Missouri, 321 F. 2d 887, 891 (2) (8th Cir., 1963); *Manaia v. Potomac Electric Power Company*, 268 F. 2d 793, 798-799 (4th Cir., 1959), certiorari denied, 361 U.S. 913, 4 L. Ed. 2d 183; *Schroeder v. Texas & Pacific Ry. Co.*, 243 S.W. 2d 261, 263 (Tex. Civ. App. 1951, no writ hist.); *Pen-Ken Gas & Oil Corp. v. Warfield Natural Gas Co.*, 137 F. 2d 871, 877 (6th Cir., 1943), certiorari denied, 320 U.S. 800, 88 L. Ed. 483, rehearing denied, 321 U.S. 803, 88 L. Ed. 1089; *Fidelity and Deposit Company of Maryland v. United States*, 187 U.S. 315, 47 L. Ed. 194 (1902).

In *Manaia v. Potomac Electric Power Company*, 268 F. 2d 793 (4th Cir., 1959), supra, on pages 798-799, the Court said:

> "Finally, it is said that granting these judgments n.o.v. was a denial of the plaintiffs' rights under the

> Seventh Amendment. It is apparent from their brief, however, that the learned counsel for the plaintiffs have no deluding impression that this contention adds anything of substance to their position. They seem to recognize that no constitutional question arises when the court withdraws from the jury a case in which there is no issue of fact requiring the jury's determination. The power of the court to withdraw such cases from the jury is too firmly rooted in history and tradition for frontal attack. Nor do the parties here suggest that the power be allowed to atrophy, for its employment within its well defined boundaries is a protective restriction as necessary to the vigorous functioning of the jury system as preservation of the prerogatives of the jury. The contention does not question the established principles; it merely seeks an obscuring injection of the linguistics of constitutional principle into the familiar process of appraisal of evidence and its associated inferences."

The Texas Court of Civil Appeals in this case fully discussed the testimony and evidence in this case and correctly concluded there was no fact issue and that there was no evidence to support the judgment under any theory and that the trial court erred in not granting Defendants' Motion for Instructed Verdict or Judgment N.O.V. Thus, regardless of the correctness of the Court's holding that under the "law of the case" there was no trade secret or confidential relationship, the Court of Civil Appeals' judgment is fully supported by its holding that under the testimony presented there was no evidence to support recovery for plaintiffs under any theory and no fact issue in the case.

Petitioners do not even attempt to justify their statement that such holding was a "purported" ground of decision. In fact, the Court of Civil Appeals devoted a

much greater portion of its opinion and discussion of the testimony to its holding of "no evidence" than it did to its holding with regard to "the law of the case."

This Court had similar cases before it on the merits in *Sears, Roebuck & Company v. Stiffel Company*, 376 U.S. 225, 11 L. Ed. 2d 661 (March 9, 1964), and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 11 L. Ed. 2d 669 (March 9, 1964). In fact, these cases were much stronger from the plaintiff's standpoint than the case at bar. Under these cases, if the Texas Court of Civil Appeals in this case had reached a contrary decision, it would have been invalid under *Article I, Section 8, Clause 8* of the *United States Constitution*. This Honorable Court, in the Compco case held:

> "* * * Today we have held in Sears, Roebuck & Co. v. Stiffel Co., supra, that when an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article. To forbid copying would interfere with the federal policy, found in Art. I § 8, Cl. 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain. Here Day-Brite's fixture has been held not to be entitled to a design or mechanical patent. Under the federal patent (376 U.S. 238) laws it is, therefore, in the public domain and can be copied in every detail by whoever pleases. It is true that the trial court found that the configuration of Day-Brite's fixture identified Day-Brite to the trade because the arrangement of the ribbing had, like a trademark, acquired a 'secondary meaning' by which that particular design was associated with Day-Brite. But if the design is not entitled to a design patent or other federal statutory protection, then it can be copied at will."

CONCLUSION

Wherefore, Respondents pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE

Copy of the foregoing was deposited in the United States mail at Midland, Texas in a properly stamped envelope for air mail delivery addressed to Petitioners' counsel, viz.: Maurice J. Hindin, Esq., at his post office address, 400 South Beverly Drive, Beverly Hills, California, and in a properly stamped envelope addressed to Petitioners' counsel, W. B. Browder, Jr., Esq., at his post office address, Midland Savings Building, Midland, Texas, this the 4 day of July, 1965. THIS I CERTIFY.

WILLIAM L. KERR,
111 Midland Tower Bldg.,
Midland, Texas.

APPENDIX A

14th Amendment to United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

Texas Constitution

Article 1, Section 15. The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency. Provided, that the Legislature may provide for the temporary commitment, for observation and/or treatment, of mentally ill persons not charged with a criminal offense, for a period of time not to exceed ninety (90) days, by order of the County Court without the necessity of a trial by jury. As amended Aug. 24, 1935.

APPENDIX C

Vernon's Texas Civil Statutes

Article 2123. The right to trial by jury shall remain inviolate, subject to the following rules and regulations. (Constitution, Art. 1, Sec. 15)

APPENDIX D

Texas Rules of Civil Procedure

Rule 166-A. (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

(b) * * *

(c) Motion and Proceedings Thereon. The motion shall be served at least ten days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

APPENDIX E

Texas Rules of Civil Procedure

Rule 301. The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity. Provided, that upon motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any Special Issue Jury Finding that has no support in the evidence. Only one final judgment shall be rendered in any cause except where it is otherwise specially provided by law. Judgment may, in a proper case, be given for or against one or more of several plaintiffs, and for or against one or more of several defendants or intervenors.

APPENDIX F

Federal Rules of Civil Procedure

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended Dec. 27, 1946, effective March 19, 1948.

(b) * * *

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

APPENDIX G

Federal Rules of Civil Procedure

Rule 50. Motion for a Directed Verdict

(a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new

trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) Same: Conditional Rulings on Grant of Motion. (1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve

a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) Same: Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted. As amended Jan. 21, 1963, eff. July 1, 1963.

APPENDIX H

Federal Rules of Civil Procedure

Rule 8. General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

APPENDIX I

Texas Rules of Civil Procedure

Rule 45. Definition and System

Pleadings in the district and county court shall

(a) Be by petition and answer.

(b) Consist of a statement in plain and concise language of the plaintiff's cause of action or the defendant's grounds of defense. That an allegation be evidentiary or be of legal conclusion shall not be ground for objection when fair notice to the opponent is given by the allegations as a whole.

(c) Contain any other matter which may be required by any law or rule authorizing or regulating any particular action or defense.

(d) Be in writing, signed by the party or his attorney, and be filed with the clerk.

All pleadings shall be so construed as to do substantial justice.

APPENDIX J

Texas Rules of Civil Procedure

Rule 47. Claims for Relief

A pleading which sets forth a claim for relief, whether an original petition, counterclaim, cross-claim, or third party claim, shall contain

(a) a short statement of the cause of action sufficient to give fair notice of the claim involved, and

(b) a demand for judgment for the relief to which the party deems himself entitled.

Relief in the alternative or of several different types may be demanded.